United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL 74-2694

United States Court of Appeals
For the Second Circuit

FRANCIS X. DONOVAN,

Plaintiff-Appellant,

v.

PENN SHIPPING CO., INC. and
PENN TRANS CO., INC.,

Defendants-Appellees.

PETITION ON BEHALF OF PLAINTIFF-APPELLANT FOR RE-HEARING AND SUGGESTION FOR RE-HEARING EN BANC

PAUL C. MA[illegible]
Attorney for Plaintiff-Appellant
11 Broadway
New York, N.Y. 10004
(212) DI 4-1936

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

CASES CITED

Other Authority

United States Court of Appeals For the Second Circuit

FRANCIS X. DONOVAN

Plaintiff-Appellant,

v.

PENN SHIPPING CO., INC., et al.

Defendants-Appellees

PETITION ON BEHALF OF PLAINTIFF-APPELLANT FOR RE-HEARING AND SUGGESTION FOR RE-HEARING EN BANC

PRELIMINARY STATEMENT

This petition is submitted by plaintiff-appellant pursuant to Rule 40 of the Federal Rules of Appellate Procedure. This petition seeks a re-hearing of the decree of this court rendered on June 8, 1976 dismissing plaintiff's appeal for lack of jurisdiction. Plaintiff, who was awarded a $90,000 jury verdict, which was conditionally reduced to $65,000 by the trial judge, attempted to accept the reduced amount under protest and to obtain review of the trial court's action on an appeal.

The basis for the requested re-hearing is for reconsideration by the entire Court of the rule denying the appealability of an order conditionally granting a new trial

unless there is a remittitur. It is plaintiff-appellant's contention that where a plaintiff accepts a remittitur under protest and waves his right to a new trial: (1) the order is final and appealable (2) permitting the appeal is in the interest of justice. Plaintiff-appellant asks that this case be considered together with the case of *Evans v. Calmar*, Docket No. 75-7456.

In the alternative, plaintiff-appellant requests that this appeal be treated as a petition for madamus.

Plaintiff-appellant further requests a ruling on his request for interest from the date of the jury's verdict.

POINT I

PLAINTIFF URGES THAT A REHEARING EN BANC BE HELD TO DECIDE WHETHER THE DISSENTING OPINION OF JUDGE FEINBERG SUGGESTING THAT REMITTITURS ACCEPTED UNDER PROTEST BE REVIEWABLE ON APPEAL SHOULD NOT BE ADOPTED AS THE LAW OF THIS CIRCUIT

Little needs to be added to the thoughtful and scholarly dissenting opinion of Judge Feinberg. The rule requiring a plaintiff to endure the agony of a second trial before obtaining an appellate determination as to whether the trial judge has wrongfully deprived him of his constitutionally guaranteed right to a jury trial is most certainly coercive. Where, as here, the trial judge has made serious errors and omissions in analysing the evidence, the result is particularly unjust. If the Law Review articles cited by Judge Feinberg accurately reflect the thinking of legal scholars, then most assuredly the Fifth Circuit is leading the way with a progressive and fair approach to the problem.

One further point, touched on by Judge Feinberg, might bear consideration. What about the cases where the amount of the remittitur is found to be excessive? This problem is handled smoothly in the Fifth Circuit by remanding to the district court for a redetermination of the amount of the remittitur. c.f. *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F2 1033 and 456 F2 180. Suppose in a hypothetical case in this Circuit a plaintiff is awarded $100,000, and a remittitur of $50,000 is refused. If a second jury awards $60,000 and this Court finds that the original remittitur should only have been $25,000, will the plaintiff receive $75,000, because that is the amount justified by the evidence in the first trial, or will he receive $60,000, because the trial judge did not abuse his discretion in conditionally ordering a new trial, even though he remitted too much? If the plaintiff does not agree to the $75,000, may he have yet a third trial? These troublesome questions are avoided by allowing the remittitur to be accepted under protest.

When an order of remittitur is made there is of course a substantial risk that plaintiff may recover at a second trial a lesser verdict than was awarded to him by the first jury, or even a lesser verdict than the amount allowed him in the order of remittitur. But there is also the possibility that if he is willing to endure the agony of a new trial, that he may recover yet a larger verdict from a second jury, and if the trial is before a different judge whose thinking is different from that of the first, that such larger verdict would be permitted to stand.[1] Thus, in denying his right to a second

1. c.f. *Johnson v. Lykes Brothers*, U.S. District Court for the Southern District of New York, 68 Civ. 2235, where Judge Levet set aside a jury verdict in the amount of $30,000 as being grossly excessive. At a second trial, upon the same proof, before Judge Bauman, there was a verdict for $60,000 which Judge Bauman refused to set aside.

trial plaintiff is relinquishing a valuable right. Defendant, on the other hand, really loses nothing because if the jury verdict is sustained, the plaintiff is only receiving what has been found he is entitled to.

POINT II

WHERE A TRIAL JUDGE IN GRANTING A REMITTITUR MAKES SERIOUS AND OBVIOUS MISTAKES AND OMISSIONS IN REVIEWING THE EVIDENCE, THE PLAINTIFF SHOULD NOT BE REQUIRED TO SUBMIT TO A SECOND TRIAL IN ORDER TO OBTAIN APPELLATE REVIEW OF THE ORDER OF REMITTITUR.

As pointed out in plaintiff-appellant's brief at pages 18-19, the trial Court made four errors in his analysis of the evidence in this case which more than counterbalance the $25,000 remittitur. Although they were pointed out to the Court on the motion for reargument, the motion was denied. It is a harsh rule which requires a second trial to correct this sort of factual error. If this court sees fit to adhere to the opinion announced by the majority. Appellant respectfully requests that this appeal be heard as a petition for mandamus. cf *Grace Line, Inc. v. Motley*, 2nd Cir. 1971, 439 F2d 1028.

POINT III

WHERE THE CLERK FAILS TO ENTER JUDGMENT FORTHWITH UPON THE VERDICT OF THE JURY, AND THE ENTRY OF JUDGMENT IS DELAYED DESPITE THE REQUEST OF THE PLAINTIFF THEREFOR, PLAINTIFF SHOULD BE AWARDED INTEREST FROM THE DATE OF THE VERDICT IN HIS FAVOR.

Plaintiff-appellant requested in his brief (p. 20) that the judgment entered on August 6, 1975 be amended so as to include interest from the date of the verdict. No reason appears why judgment was not entered forthwith by the clerk, as required by Rule 58. Plaintiff wrote to the Court on April 30, 1974 requesting that this be done. Defendant has had the benefit of the money during a period of high interest rules. It would be just to allow plaintiff interest from the date of the verdict.

CONCLUSION

The order of remittitur should be reviewed either as an appeal or by mandamus and the district court directed to enter judgment for the plaintiff in the amount of $90,000, together with interest from February 22, 1974.

Respectfully submitted,

PAUL C. MATTHEWS
Attorney for Plaintiff-Appellant

MATTHEWS Donovan v. Penn Shipping 2319

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of July , 19 76 at No. 19 ~~Reeat~~ Rector St. NYC deponent served the within Petition upon Darby, Healey & Stonebridge, Esqs. 3 the ~~A~~ Respondents herein, by delivering a true copy thereof to hem personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Respondents therein.

Sworn to before me,
this 6 day of July 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978 1977